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No. 355

In the Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. 6a) dismissing a complaint challenging a decision and order of the Interstate Commerce Commission (J.S. App. 8a). On September 11, 1963, appellants, the National Motor Freight Traffic Association, Inc., and the Regular and

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Irregular Route Conferences of the American Trucking Associations, Inc., filed with the Commission a complaint which, as amended, alleged that various defendants including Pacific Progress Shippers Association (Pacific), were engaged in operations as freight forwarders as defined in Section 402(a)(5), 49 U.S.C. 1002(a)(5), without the permit required by Section 410(a), 49 U.S.C. 1010(a). The complaint sought a Commission order requiring each defendant to cease and desist from the alleged violations of the Act. A hearing was held before a Commission examiner in March, April, and June, 1965. On December 29, 1965, the examiner issued his report, in which he found that Pacific was an association of shippers whose operations had been conducted in good faith pursuant to the clarifying provision of Section 402(c) of the Act; that none of the defendants were engaged in services as freight forwarders under Section 402(a)(5); that the members and the elected trustees of Pacific assumed the essential risks and burdens of the association and controlled, directed, and dominated its operations; and that the evidence adduced failed to establish the allegations of the complaint. Consequently, the examiner recommended dismissal of the complaint. Thereafter, exceptions were filed and on June 20, 1966, the Commission, by its Division 1, issued a decision and order affirming and adopting, with one exception not herein pertinent, the report and recommended order of the examiner (J.S. App. 8a–102a). The Commission observed that the evidence, when considered in light of the standards enunciated in *Atlanta Shippers Assn., Inc.—Investigation,*

322 I.C.C. 273, and *National Motor Freight* v. *New Hampshire Shippers Co-op.*, 323 I.C.C. 658, justified the result reached by the examiner. The Commission, therefore, dismissed the complaint (J.S. App. 8a–102a).

Appellants then filed their complaint in the district court seeking to annul and set aside the decision and order of the Commission. On December 6, 1967, the district court issued a *per curiam* opinion dismissing the complaint (J.S. App. 4a–5a). After quoting Section 402(c), 49 U.S.C. 1002(c), the court noted that the findings of the Commission revealed that the statutory language clearly applied to Pacific, and, without further consideration of Commission opinions interpreting the statute, dismissed the complaint.

ARGUMENT

Appellants' primary contention is that the Commission erroneously concluded that Pacific was a bona fide shippers' association pursuant to Section 402(c), 49 U.S.C. 1002(c), because there is an absence of joint and several liability on the part of the membership of Pacific. The Commission found, however, that the members and trustees of Pacific bore the essential risks and burdens of the association and, thus, the association came within the purview of Section 402(c). This holding is in accord with its prior decisions, that joint and several liability on the part of the members of a shippers' association is not a prerequisite to a finding of compliance with the provisions of Section 402(c). *Atlanta Shippers Assn., Inc.—Investigation,* 322 I.C.C. 273, 283–288. See, also, *Regula-*

tions for Payment of Rates and Charges, 326 I.C.C. 483, 495; *Natl. Motor Frt. Traf. Assn.* v. *Industrial Shippers Assn.,* 103 M.C.C. 545, 552–553.

The Commission's position, as articulated in these cases,[1] was approved in *Freight Forwarders Institute* v. *United States,* 263 F. Supp. 460, 465 (S.D.N.Y.), where the court said: "We agree with the Commission that it is sufficient that these risks [of operation] *not* be borne by any party other than the shipper association itself, whatever its limitations on individual member liability, as long as the members in good faith exercise responsible control over their association's operations."

The Commission's conclusion that the members and trustees of Pacific, and no other person, bore the essential risks and burdens of the association, is supported by adequate findings (J.S. App. 79a–90a) and based upon substantial evidence of record (J.S. App. 16a–70a; J.S. App. 94a–102a; Exh. A of Exh. 41, Exh. C of Exh. 46, Exh. 48, Exhs. A and C of Exh. 56).[2] Thus, the decision and order of the Commission was properly sustained by the district court. *Consolo* v. *Federal Maritime Commission,* 383 U.S.

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[1] The Commission's holding in *Atlanta Shippers,* is, of course, an application of this Court's decision in *United States* v. *Drum,* 368 U.S. 370. That case requires only that a shipper (in the present case, the association) bear the burdens of the operation. It says nothing of the question of individual liability of members of the association.

[2] In the court below appellants conceded that they did not challenge the correctness of the Commission's conclusion that the members and trustees of Pacific controlled, directed, and dominated its operations (Reply brief, pp. 1, 4–5).

607, 619–621; *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, 138–140.

Appellants also contend that the district court erred in finding it unnecessary to consider the rationale articulated by the Commission in *Atlanta Shippers Assn., Inc.—Investigation, supra,* which the Commission referred to here in reaching the conclusion that Pacific was a bona fide shippers' association exempt from regulation under the provisions of Section 402(c).[3] The district court concluded, however, that the amply-supported findings of the Commission showed that the organization and operation of Pacific were precisely within the language of Section 402(c), 49 U.S.C. 1002(c) (J.S. App. 5a). Since the district court based its determination on a reading of the statutory language, it is irrelevant that the Commission did not directly base its decision on the statute but instead applied its earlier decisions interpreting it. *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, 88; *Milk Transport, Inc.* v. *I.C.C.,* 190 F. Supp. 350, 354–355 (D. Minn.), affirmed *per curiam,* 368 U.S. 5. See also *Lester C. Newton Trucking Company* v. *United States,* 264 F. Supp. 869, 876–877 (D. Del.), affirmed *per curiam,* 389 U.S. 30.

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[3] Contrary to appellants' contention (J.S. 39), the holding of the district court does not reject the Commission's rationale (J.S. App. 5a). Rather, the court found it unnecessary to discuss the Commission's reliance on *Atlanta Shippers.*

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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